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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-156

UNITED STATES *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Petitioners,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. MCGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK; GEORGE F. MCGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Otis Chestnut, Michael Brown, Stephen Martinot, Ellen Shallit and Levi Laub respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 5, 1971.

Opinions Below

The opinions of the Court of Appeals and the District Court for the Southern District of New York are not yet reported and appear in the appendix hereto, as do the two opinions of Circuit Judge Robert P. Anderson denying

rehearing of his order staying the District Court order granting bail.

The opinion of the Court of Appeals of the State of New York is reported at 26 N.Y.2d 481, 260 NE 2d 501 (1970) and is appended hereto. The opinion of Justice John M. Murtagh in the Supreme Court of the State of New York, New York County, is reported in the New York Law Journal, April 5, 1967 (p. 18, c.6) and is appended hereto.

The opinion of the United States Court of Appeals, remanding to the state courts after removal is reported at 370 F.2d 1 (1966) and is printed at Appendix H. The unreported District Court opinion ordering remand is printed at Appendix I.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on May 5, 1971 and this petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

The all-White Second August, 1964 Grand Jury of New York County ordered that petitioners be charged with violation of Section 600 subdivision 6 of the New York Penal Law for refusing to answer its questions. (Petitioners were later convicted in the Criminal Court of New York County.) One of the petitioners, Otis Chestnut, is Black, all were poor or very poor and under 35 years of age. The questions presented are:

1. Whether petitioners were deprived of the due process and equal protection guaranteed them by the Fourteenth Amendment because New York County used as its sole source of grand jurors (including those on the Second August, 1964 Grand Jury) a list of volunteers which did not—and which it knew did not—reflect in any way a cross section of the population suitable in character and intelligence for that civic duty? Specifically:

a. Adults under 35 (30% of the group made eligible by statute) were deliberately and intentionally excluded from grand jury service.

b. The very poor were deliberately and intentionally excluded from grand jury service: i.e. welfare recipients were totally excluded; at the time 90% of the 1964 grand jury list was chosen, persons who (with their spouses) had assets of less than $250 were excluded;

c. Negroes who constituted 24% of the eligible population comprised 1.65% of the grand jury list;

d. Puerto Ricans, who constituted 9% of the eligible group, comprised .03% of the grand jury list;

e. Blue collar workers were substantially underrepresented.

2. Whether petitioners were deprived of due process guaranteed them by the Fourteenth Amendment because New York County drew its grand jurors exclusively from volunteers?

Statutory Provisions Involved

New York City Criminal Court Act, Section 42:

"(1) Where the defendant has been held to answer for trial in a part of the court held by a panel of three of the judges thereof as provided in section forty of this act, or where such a trial shall be directed in a misdemeanor case by a grand jury and approved by order of the Court for which the Grand Jury is drawn, the action must be prosecuted by information made by the district attorney . . ."

New York Judiciary Law, Section 596:

"Qualifications of jurors:

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must: 1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy years of age.

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. Be in the possession of his natural faculties and not infirm or decrepit.

5. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

6. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meanings of this section. Added L.1940, c.202, Section 1, eff. Sept. 1, 1940."

New York Penal Law (former), Section 600:

"A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor:

". . . 6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

Statement of the Case

The petitioners in this habeas corpus proceeding seek relief from their conviction in the Criminal Court of the City of New York for violation of Section 600 subdivision 6 of the New York Penal Law (former) for refusal to answer questions of the Second August, 1964 New York County Grand Jury. Petitioners were sentenced to varying terms of imprisonment (30 days to six months); they have served their terms.

In the winter of 1964-1965, the Second August, 1964 Grand Jury of New York County was conducting an investigation into the Harlem riots of the summer of 1964. This was the same Grand Jury which returned the indictment in *People* v. *Epton*, 19 N.Y. 2d 496, 227 NE 2d 829 (1967),

app. dsmd., cert. den. sub nom. Epton v. *New York,* 390 U.S. 29, 88 S. Ct. 824, 19 L. Ed. 2d 808 (1968). Petitioners were summoned before it and, after they refused to answer its questions, the Grand Jury, acting under New York Law (New York City Criminal Court Act, Sec. 42) directed the District Attorney of New York County to file the informations against petitioners, a direction which became effective upon the *ex parte* approval of a justice of the New York Supreme Court.

Petitioners rely upon the record developed at a New York Supreme Court evidentiary hearing before Mr. Justice John M. Murtagh on their motion to revoke that court's approval of the Grand Jury direction that the information issue and upon the uncontested allegations of their habeas corpus petition. It is the thrust of petitioners' position that they, who were all under 35, poor and very poor, Black or allied with Blacks, were deprived of a grand jury of their peers. The record shows that New York County knowingly maintained a grand jury selection system which resulted in less than token representation of Negroes and Puerto Ricans and deliberately excluded all adults under 35 and the very poor (welfare recipients and persons with less than $250 in assets).

The Selection System

New York County grand jurors are selected by lot from a grand jury list of approximately 2200 composed of volunteers, drawn from the much larger petit jury list. (Petit jury service is compulsory.) Annual turnover on the grand jury list is about 9% a year and each year replacement volunteers for the group are selected by the County Jury Board after preselection by the County Clerk's office.

By statute all intelligent, able bodied, literate adult citizen-residents of good character were made eligible for grand jury service provided they or their spouse had $250 in assets and that they had not been convicted of a felony or a misdemeanor evidencing moral turpitude. (New York Judiciary Law, Section 596.) The operation of the selection system in practice is quite different.

The Admitted Deliberate Exclusions

1. Adults under 35 (who in 1960 comprised 30% of the adult population of New York County) were deliberately excluded from grand jury service although they may be on the petit jury list.

2. A juror (or his spouse) was required to possess property worth $250. It was testified that this property qualification had been dropped administratively in 1960. However, because there was a minimum time lag of three years between entering petit jury service and eligibility for grand jury service, the Second August, 1964 Grand Jury was chosen from a grand jury list 90% (or more) of which had been selected under the property qualification.

3. Welfare recipients were excluded from petit jury and grand jury service.

The Results of the Volunteer System: The Massive Underrepresentation of Blacks, Puerto Ricans and the Non-affluent

The record shows that the New York County selection system resulted in grand jury lists which were massively unrepresentative of New York County. Only 1.65% of the grand jury list was Black although Negroes comprised

more than 24% of the population over 21. The probability of such a result occurring by random selection in any one year is the astronomical figure of .00000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000006 (95 zeros).

The figures on Puerto Ricans are not significantly different. English speaking eligible Puerto Ricans (persons born in Puerto Rico) comprised 9% of New York County's population over 21. They comprised .03% of the grand jury list!

The non-affluent group was generally eliminated in grand jury selection. Only 25 persons on the 1964 grand jury list could be identified as blue collar workers using census bureau classifications. Yet blue collar workers comprised 47% of the total employed in New York County.

New York County's Knowledge That the Volunteer System Produced Unrepresentative Grand Juries

At the hearing, and at all stages of this proceeding, the prosecutor contended that it was the volunteer selection system which was responsible for the discriminatory results. Yet the record is quite clear that for many years the jury selection personnel was well aware of these enormous malproportions and took no meaningful steps to correct them. As one of the clerks (Budin) testified ". . . we gave up on it."

The Record Evidence Concerning Adults Under 35

At the hearing before Mr. Justice Murtagh, petitioners called Dr. Bernice Neugarten, Associate Chairman of the Committee on Human Development at the University of Chicago and an authority on the age groupings and their

differing social attitudes. Her testimony, unrebutted, was what all the world knows—that persons between the approximate ages of 21 and 32 comprise and are generally recognized as a separate and defined class, usually characterized as "young adults." Indeed, expert testimony was not necessary to demonstrate that adults under 35 comprise a class of persons different from other age groupings. Mr. Justice Murtagh took judicial notice of this fact.

The Continuing Undemocratic Selection System

At some time subsequent to the hearing, certain changes were made in the New York County selection system. The absolute discrimination against adults under 35 was dropped in favor of a requirement of one term of petit jury service. The exclusion of welfare recipients was also dropped. However, a New York County Supreme Court hearing in October, 1969 showed that these changes were not significant. The selection results were relatively unchanged. (*People* v. *Shakur*, No. 1048/1969).

a. Of 150 grand jurors examined personally only 3 (1.5%) were Negroes;

b. No grand jurors were under 31 (out of 2,913). Only 3 (.1%) were in the 31-35 group.

c. No welfare recipients had ever served on a grand jury.

The Lower Court Proceedings and Rulings

Mr. Justice Murtagh denied petitioners' motion. (His opinion is set out in the Appendix.) Petitioners were then tried, convicted and sentenced by a three judge court in the Criminal Court of the City of New York. The con-

victions were affirmed without opinion by the Appellate Term of the New York Supreme Court and by the New York Court of Appeals. *People* v. *Chestnut et al.*, 26 N.Y. 2d 481, 260 N.E.2d 501 (1970).

The New York Court ruled in substance that since the extreme ethnic and economic malproportions of the grand jury list could be explained by the operation of the volunteer system there was no "intentional and systematic" discrimination and hence, it said, no unconstitutionality in the grand jury selection system.

As to the admitted intentional and systematic discriminations against adults under 35 and welfare recipients, the New York Court held them not to be "so totally lacking in rational justification" as to be unconstitutional.

The New York Court did not discuss the property qualification except to note that it was not applied in the 1964 selection.

The Habeas Corpus Proceedings

Bail pending application for certiorari was denied by the state Court and this Court. Petitioners then surrendered to the New York Court and the present habeas corpus proceedings were commenced in the District Court for the Southern District of New York before Judge Harold R. Tyler, Jr. At the same time the case of *Epton* v. *Nenna* was reopened before Judge Marvin E. Frankel in the same district. (In the latter case William Epton had applied for habeas corpus relief and been released on bail pending the state court decision in the instant case.)

Judge Tyler was initially of the opinion that petitioners raised substantial constitutional questions and ordered

their release on bail. The District Attorney then applied to the "duty judge" of the Court of Appeals for the Second Circuit, Judge Robert P. Anderson, who stayed the grant of bail on the ground that petitioners lacked standing to raise the constitutional issues. (Judge Anderson's two opinions on rehearing are set forth in the Appendix.) Some weeks later Judge Anderson's ruling was upheld by the Court of Appeals on grounds akin to mootness: that Judge Tyler was about to decide the case on its merits.

On October 5, 1970, Judge Frankel handed down his ruling in *Epton,* 318 F. Supp. 899 (S.D.N.Y., 1970), denying habeas corpus relief and finding no unconstitutionality in the New York grand jury selection system. The ethnic and economic malproportions, Judge Frankel held, were not the result of "purposeful or intentional" discrimination. He regarded discrimination against adults under 35 as reasonable.

Judge Frankel regarded the exclusion of the very poor as a more difficult question. However, "acknowledging grave doubts," he upheld Epton's conviction on the grounds: (1) that there was no "prejudice" to Epton; (2) that the discrimination was no longer practiced; (3) that the discrimination against welfare recipients was not based on their poverty but because they might have been regarded as state employees.

(With regard to Judge Frankel's finding of lack of "prejudice," we understand that the record is quite clear that Epton was himself very poor. The lack of "prejudice" relied upon by Judge Frankel is not a finding that Epton was outside the excluded group; it seems to be a

finding that a grand jury would be justified on the facts in putting Epton to trial.)

Simultaneously with Judge Frankel's decision, Judge Tyler handed down his decision denying relief in this case. (Judge Tyler's decision and his decision on rehearing are set forth in the Appendix.) Judge Tyler found possible constitutional merit in petitioners' complaint of the discrimination against the exclusion of adults under 35 and welfare recipients. Nonetheless, Judge Tyler held that petitioners lacked "standing" to raise these questions—that they had suffered no "prejudice." (By this language Judge Tyler seemed to mean that, in his opinion, petitioners were guilty of the crime charged.)

On appeal to the Circuit Court of Appeals for the Second Circuit, Judge Tyler's decision was upheld but on grounds directly opposite to his. (The opinion below is set forth in the Appendix.) Judge Irving Kaufman, speaking for the three-judge panel, found that petitioners did have "standing" to raise the constitutional question (fn. 7); but, he held, their constitutional objections to the grand jury selection system were insufficient.

The court below found no denial of due process or equal protection. It found that petitioners had "failed to demonstrate" that the non-representative quality of the grand jurors had caused bias on the Grand Jury (placing the burden of proof upon petitioners). As to petitioners' equal protection claim, the court below found no "purposeful" ethnic discrimination. Moreover, as to the claimed *de facto* denial of equal protection by the grand jury malproportions, the court found this counterbalanced by its own presumption that volunteer grand jurors would be more conscientious.

As to the exclusion of adults under 35, the court rejected petitioners' claim that an entire generation had been excluded as "hyperbole" and was unable to find any constitutional distinction between a lower age limit of 21 and one of 35.

None of the petitioners are Puerto Ricans or welfare recipients. The court below held that, therefore, petitioners were not denied equal protection by the non-representation of these groups.

The property qualification was conceded to be unconstitutional ("without justification"). Nonetheless, it was held to be *de minimis*.

Lastly, we note that all of the lower courts accepted as a basic premise that there is a constitutional distinction between intentional initiation of a grand jury selection system which would operate to discriminate, and the knowing perpetuation of such a system.

Reasons for Granting the Writ

1. New York County has denied petitioners a jury of their peers. Far from being representative of the community the New York grand jury was a travesty of the community. Young, poor; Black or allied with Blacks, petitioners were summoned, questioned without counsel and charged by a grand jury from which the young, the poor and ethnic minorities were excluded. This exclusion was not an isolated instance. It was the inevitable and consistent result of the operation of a selection system of long standing. Moreover, the operative results of the selection system was well known for a long time to the selection officialdom, yet it was continued unchanged.

These facts warrant review by this Court. We are one country and one constitution. The rights guaranteed by the Fourteenth Amendment are the same in every section. If New York with its powerful position in the political, economic and cultural life of our country has found a scheme which enables it to keep Negroes, Puerto Ricans, young adults and the poor off juries, that same scheme is available to other counties: North and South.

If the labors of the hero judges of the Fourth and Fifth Circuits are to be brought to naught, then it should only be after decision by this Court.

2. The decisions below conflict with the decisions of this Court. From *Strauder* v. *West Virginia,* 100 U.S. 303 (1880) this Court has ruled that the selection system for state juries must provide a "fair possibility for obtaining a representative cross section of the community." *Williams* v. *Florida,* 399 U.S. 78, 100 (1970). In *Brown* v. *Allen,* 344 U.S. 443, 474 (1953), this Court recognized that the source from which grand jurors are drawn must "reasonably reflect a cross section of the community suitable in character and intelligence for that civic duty." It is plain that the selection system of New York County does not provide *any* possibility of obtaining a fair cross section of the community because the group of volunteers which is the "source" of New York County grand juries is itself completely unrepresentative of the community. See also: *Smith* v. *Texas,* 311 U.S. 128, 130 (1940).

The thrust of *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), governs this case. A grand jury may not be necessary to a constitutional scheme of justice; the community voice as to the initiation of prosecution may express itself through

an elected representative. If, however, the state scheme provides for a grand jury, it is of the essence of our tradition, "fundamental," that it should be drawn from the whole community. There is no place in "an Anglo-American regime of ordered liberty" (391 U.S. at 149-50 fn. 14) for an elitist grand jury both unrepresentative in composition and unanswerable to the democratic process.

3. Posing the constitutional issues in their simplest terms, the rulings below each rest on a constitutional distinction between a selection system which is designed *ab initio* to discriminate, and the *knowing* perpetuation of a system which—whatever its original rationale—operates *de facto* to discriminate. We submit that this distinction is morally and constitutionally meaningless. See *Baker* v. *Carr,* 369 U.S. 186 (1962), finding a denial of equal protection in state failure to redistrict an unequal districting scheme. Again, if the right to a jury of one's peers can be defeated by so simplistic a device, then it should be this Court which determines that fact.

4. There is an objective test for unconstitutionality as well as a subjective one. The selection system must not "operate to discriminate." *Avery* v. *Georgia,* 345 U.S. 559, 561 (1953). See also, *Hill* v. *Texas,* 316 U.S. 400, 404 (1942); *Cassell* v. *Texas;* 339 U.S. 282, 296-298 (1950) (Mr. Justice Clark, concurring).

This conclusion follows inevitably from the reason for the constitutional doctrine. If due process and equal protection require that a defendant not be denied a jury of his peers, then it is unimportant whether the denial is deliberate, knowing (as here), or the result of prolonged official somnolence. Cf. *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971).

(For a similar development, see *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961), adding an objective liability under the Civil Rights Acts to the subjective test of *Snowden* v. *Hughes,* 321 U.S. 1 (1943). See also, *Baker* v. *Carr, supra.*)

5. The Second Circuit decision also conflicts directly with the decisions of this Court by requiring that the petitioners show actual bias and partiality resulting from the denial of a jury of their peers. The decision is both incorrect and, on a most basic level, deeply misunderstands the essential nature of the constitutional right.

In the first place such a requirement would make the right to a proper grand jury a mere redundancy to the already protected right against juror bias.

In the second place, the difficulties of meeting such a burden of proof would reduce the right from a universal one to a right enjoyed only by a lucky few.

Finally, and most importantly, partiality or bias have nothing to do with the issue, since individual guilt or innocence are irrelevant to the constitutional right. The lower court has resurrected and adopted the argument of the dissent in *Strauder, supra,* and *Ex Parte Virginia,* 100 U.S. 339, 349. In that dissent it was argued vigorously and well (pp. 368-369) that a mixed jury was not, *ipso facto,* a guarantee of impartiality, and that if race were to indicate partiality then a Negro defendant would be entitled to an all Black jury. Hence, said the dissent, the Fourteenth Amendment does not guarantee a cross section jury, a jury of one's peers.

The Court's ruling in *Strauder* rejected this argument. *Strauder* proclaims a more basic civil right: "all persons . . . shall stand equal before the laws of the States . . ."

(100 U.S. at 307). In a heterogeneous society such as ours, the *Strauder* Court held, this means that where a jury is required, all groups of the community must be represented.

Later decisions have consistently adhered to the seminal *Strauder* majority decision and rejected the argument of the dissent. All men must stand on equality before the bar of justice in every American court. *Chambers* v. *Florida,* 309 U.S. 227, 241 (1940); *Griffin* v. *Illinois,* 351 U.S. 12 (1956). That is the issue where jury composition is questioned—not jury prejudice or even individual guilt or innocence. *Cassell* v. *Texas, supra, Hill* v. *Texas, supra, Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *Avery* v. *Georgia, supra.*

(The lower court's error here perhaps sprang from its erroneous belief that petitioners were asserting a *ius tertii.* This is not the case; petitioners' right to equality in the courts was not derivative from or secondary to anyone else's right. *Cassell* v. *Texas, supra* at 287. Petitioners each assert in this proceeding his own individual right to a jury of his peers, a jury chosen by a selection system which does not operate to exclude any class.)

6. In addition to placing on petitioners the burden of showing prejudice, the decision below requires petitioners to shoulder the proof of a series of matters which are constitutionally irrelevant and, where proof if required, is the state's burden. Petitioners were denied relief because they had failed to show that volunteer jurors as a class would not be more conscientious than the non-volunteer class; that welfare recipients as a class were not too timid to disagree with a prosecuting attorney; and that persons over 35 as a class did not make better jurors than persons under 35 as a class.

All of these burdens are artificial creations. The constitutional question is not whether the excluded groups made better or worse jurors than the included groups. The only question is, were the excluded groups "suitable in character and intelligence" for grand jury service? *Brown* v. *Allen, supra.* Once that question is answered affirmatively—and it has been by the New York legislature—those groups form a part of the cross section from which a jury of peers must be formed. There is no place for elitism, real or fancied.

Moreover, it is the state—not petitioners—which has the burden of showing factually, not presumptively, the *necessity* of any limitation upon petitioners' equality before the law. *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958); *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969); *Evans* v. *Cornman,* 398 U.S. 419, 425 (1970); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670 (1966).

7. Concededly, the decisions of this Court are not completely uniform. *Hoyt* v. *Florida,* 368 U.S. 57 (1961) does permit the under-representation of women by limiting their representation (but not men's representation) to volunteers. This is a special situation whose authority should not be expanded beyond its holding. Chivalry may not be a denial of constitutional right, but one exception cannot consume the rule.

Fay v. *New York,* 332 U.S. 269 (1947) turns primarily on failure of proof. Its basic premise, that exclusion of Negroes stands on a different constitutional footing than exclusion of other groups (332 U.S. at 282-289), has been overruled *sub silentio* in *Hernandez* v. *Texas,* 347 U.S. 475 (1954).

Nonetheless, as the decisions below show, the ghost of *Fay* still controls in New York's state and federal courts. This case demonstrates that unless the doctrines of *Hoyt* and *Fay* be explicitly limited, they will expand to consume the rights guaranteed by the Fourteenth Amendment. The continued vitality of those decisions urges the grant of certiorari here.

8. There is a plain conflict between the decision below and the decisions of other circuits. *Labat* v. *Bennett,* 365 F.2d 698 (5th Cir., 1966), *cert. den.,* 386 U.S. 991 (1967); *Witcher* v. *Peyton,* 405 F.2d 725 (4th Cir., 1969), *cert. den.,* 395 U.S. 943.

9. The admitted deliberate discriminations against adults under 35, welfare recipients, and persons with less than $250 in assets are even more blatantly in conflict with the rulings of this court. They conflict squarely with the ruling in *Hernandez* v. *Texas, supra,* outlawing the exclusion of any class—not only Negroes. See also, *Strauder, supra,* at 308.

We have discussed above how the lower court ruling placed the burden of proving the irrationality of discrimination upon petitioners and how, under the rulings of this Court, the burden of proof belongs to the state. We note here the following points:

As to the exclusion of adults under 35, the court below misses the main point of the record. This group comprises or contains a separate *class* from other age groups. It is for that reason that we submit that "the Constitution dictates that New York must select the traditional third multiple of seven as an age floor on jury service rather than the fifth."

In this day of the "generation gap," the members of this Court would have to be blind as judges to what they know as men to ignore the fact which the New York Court recognized—adults under thirty-five do comprise a separate class, different in experience, outlook, and thinking from other age groups. Petitioners were entitled to have that class represented on the grand jury list.

10. Welfare clients and persons with little or no assets comprise the two main component groups of the very poor. They possess special insights not possessed by others who are more fortunate economically. Petitioners were entitled as of right to have the poor not denied access to the grand jury. (The uncontradicted *habeas corpus* petition alleges that petitioners are poor and very poor, par. 11.)

The court below found the exclusion of persons with few assets to be unconstitutional but *"de minimis,"* even though at least 90% of the grand jurors were chosen while this exclusion was operative. Surely, such an attitude toward "the least of these" is incompatible with the spirit of our institutions. We know of no case where a jury has been held to be unconstitutionally selected and this Court has upheld its actions. The lower court's ruling on this issue alone warrants review.

The ruling below introduces an Orwellian concept of equality before the law. It adds to the historic equal right of the poor to sleep under bridges, a new equal right to a jury of other people's peers. Some people are more equal than others; once again, deprivations of the poor are *de minimis.*

All deliberate exclusions of eligible persons have no place in a democratic society. The whole *de minimis* concept is totally inapplicable. Certainly, the exclusion of racial or religious minorities could not be similarly approved. Poverty cannot ground second-class citizenship.

9. The ruling that since petitioners were not Puerto Ricans or welfare recipients they might not complain of these exclusions is in conflict with the ruling of the Fifth Circuit in *Labat* v. *Bennett, supra* at 723-724. Moreover, it demonstrates again, the lower court's basic error. The petitioners' right is the same as everyone's; a jury drawn impartially from the constitutionally eligible community. They need not be members of the excluded group to have this right denied. Putting the matter simply: Was Chestnut (a Negro) entitled to a different jury than his fellow petitioners? Could they be given a jury selected in a different manner than his? The questions answer themselves. All persons have an equal right to the same, constitutionally chosen jury of their peers.

10. The second of the "questions presented" raises the question of whether, in any event, the volunteer system as applied in New York County could select grand juries which could perform their function: "standing between the accuser and the accused." *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962). Our point here is that the selection system in New York County was so structured as to exclude those who might be inclined by their nature to leniency, mercy and tolerance.

There are many opportunities for volunteer public service. A person who is temperamentally reluctant to prosecute, judge and punish others will not volunteer for grand jury service. A volunteer grand jury system inevitably

attracts to itself those persons who have not only judged themselves fit to throw the first stone but have decided to do so.

We respectfully submit that the ruling below is in basic conflict with the ruling of this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510, 520 (1968), that a jury must be so constituted as to express the collective conscience of the community not just a part of that conscience.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

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Respectfully submitted,

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